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IN THE

Supreme Court of the United States

No. 78-1287

AMERICAN MARITIME ASSOCIATION,
Petitioner,

v.

MICHAEL BLUMENTHAL AND AMERADA HESS CORPORATION.

BRIEF OF SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF THE PETITION OF AMERICAN MARITIME ASSOCIATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RICHARD E. SCHWARTZ
J. STEPHEN STREET
COLLIER, SHANNON, RILL,
EDWARDS & SCOTT
1055 Thomas Jefferson Street, NW
Washington, D.C. 20007
Attorneys for Amicus Curiae
Shipbuilders Council of America

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The Shipbuilders Council of America respectfully offers this brief in support of the petition of the American Maritime Association for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this action.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported, but is reprinted in full in Appendix A to the Petition of the American Maritime Association at pages 1a-33a. The opinion

of the district court is reported at 458 F. Supp. 849 (D.D.C. 1977) and is reprinted in full in Appendix C to the Petition of the American Maritime Association at pages 36a-62a.

JURISDICTION

The judgment of the court of appeals (Petition of American Maritime Association, App. B, pages 34a-35a) was entered November 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Shipbuilders Council of America adopts the statement of questions presented, statement of statutes involved, and statement of the case, set forth in the "Petition of the American Maritime Association."

REASONS FOR GRANTING THE WRIT

The Shipbuilders Council of America concurs in the reasons presented by the American Maritime Association for granting its petition for a writ of certiorari. The Shipbuilders Council respectfully submits the following additional reasons for granting the writ.

This is a case of first impression of substantial importance to the integrity of Section 27 of the Merchant Marine Act of 1920 ("the Jones Act"), 41 Stat. 999, 46 U.S.C. §883, and to the health of United States maritime industries. The decision of the Court below creates a gaping loophole in the Jones Act and may in fact emasculate it. The decision is contrary to the express purposes of the Jones Act and threatens significant injury to the shipbuilding industry. The Court below has decided an important federal question not previously decided by this Court but which this Court should resolve.

The Ruling of the Court Below Undermines the Jones Act

The Jones Act forbids the waterborne transportation on a foreign vessel of merchandise taken between U.S. ports via a foreign port. It contains no exception for processing at a foreign port. However, such an exception has been engrafted onto the Act by the United States Customs Service—the agency charged with its enforcement—through occasional informal interpretive rulings. Subsequent to the initiation of this action in the district court the Customs Service proposed to codify this exception as follows:

> [m]erchandise is not transported coastwise if at an intermediate port or place other than a coastwise point (that is, at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point. 42 Fed. Reg. 46068 (Sept. 14, 1977).

The American Maritime Association and the Shipbuilders Council of America have maintained that this exemption is too broad because it completely ignores the intent of the shipper. We urged below that if processing at an intermediate foreign port is merely incidental to a plan to transport merchandise in the coastwise trade, such processing should not exempt the transportation from the Jones Act. The court below, however, concluded that the interpretation of the Customs was reasonable and consistent with the statutory scheme of the Merchant Marine Act of 1920 and deferred to the Customs Service's interpretation. However, we submit that the relevant Customs Service rulings have not been of the nature, consistency, or frequency to justify judicial deference. The Customs Service has *not* been consistent over the years as to whether the intent of the shipper is relevant in determining the applicability of the Jones Act.

More importantly, the recently proposed Customs Service rule, unlike many contrary previous Customs Service rulings, opens an expansive loophole in the Jones Act which undermines its ability to preserve the viability of the American merchant marine. The new test, sanctioned by the court below, relies solely upon a semantic analysis of whether the merchandise which arrives at one U.S. port is the "same" merchandise which left another U.S. port or a "new and different product." A logical extension of the Customs Service's "new and different product" test would allow the exemption of the transportation of products from one U.S. port to another where processing is completed *on board the transporting vessel* so long as the "same" merchandise that left one U.S. port did not arrive at the other U.S. port. As the Customs Service has recently applied this test, it takes very little processing to make merchandise into a "new and different product" and to thereby circumvent the Jones Act. Thus the Customs Service would exempt the transportation of two cargoes of residual fuel oil (of slightly different weight and sulfur content) shipped from Texas to New York if the cargoes were mixed together *en route* at a foreign port. 42 Fed. Reg. 46,068 (1977).

The history of the Merchant Marine Act of 1920 demonstrates that exceptions to the Jones Act must be read narrowly to avoid easy evasion which would undermine the Congressional purpose to develop and maintain a viable American merchant marine. Yet easy evasion will be the result of the determination of the Customs Service, sanctioned by the Court below, that mere processing of merchandise at an intermediate foreign port legitimizes the foreign-flag transportation of that merchandise between U.S. ports.

The Ruling of the Court of Appeals Is Contrary to the Express Purposes of the Jones Act Because it Threatens Significant Injury to the Shipbuilding Industry

The Merchant Marine Act of 1920 mandates that the agencies administering it "keep always in view" the goal of

developing and encouraging a viable U.S. merchant marine. Section 1, Merchant Marine Act of 1920, 46 U.S.C. 861. This goal will be thwarted as a result of the decision of the court below, a result acknowledged by Judge Gasch in his district court opinion:

> The testimony and papers presented to the Court strongly support the finding that if the instant transportation by foreign-flag tankers is not deemed a violation of the Jones Act, then whenever possible, foreign-flag rather than American-flag ships will be chartered for shipment of Alaskan oil to the Virgin Islands because of lower costs. Thus, a substantial amount of trade will be diverted from the American shipping industry. American ship owners and operators, shipbuilders, and seamen will lose significant business and suffer economic harm. [footnote omitted] (J.A. 18).

The extent of the damage to U.S. shipbuilding is explained in the post-trial letter of Robert J. Blackwell, Assistant Secretary of Maritime Affairs, U.S. Department of Commerce (Appendix A, 1a-3a). Mr. Blackwell explained that 15 tankers, of from 80,000 to 165,000 deadweight tons, have been contracted for in anticipation of the Alaskan oil trade under financing guaranteed by the U.S. government. Probable economic losses and possible defaults on a significant portion of the $650,000,000 of government guaranteed obligations could result if the Alaskan oil trade is not available to these vessels.

The goal of protecting the U.S. Merchant Marine has been adopted by Congress because:

> [i]t is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxillary in time of war or national emergency . . . 46 U.S.C. §861.

Thus, the precise interests which the Merchant Marine Act of 1920 was intended to protect are now seriously threatened by the niggardly view of the scope of the Act recently proposed by the Customs Service and adopted by the Court below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition of the American Maritime Association for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. SCHWARTZ
J. STEPHEN STREET
1055 Thomas Jefferson Street, NW
Washington, D.C. 20007
Attorneys for Amicus Curiae
Shipbuilders Council of America

Of Counsel:

COLLIER, SHANNON, RILL, EDWARDS
& SCOTT

Appendix A

[DoC Seal]
UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Maritime Affairs
Washington, D.C. 20239

October 25, 1977

Joseph A. Klausner, Esq.
Suite 1009-A
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Klausner:

This letter is being sent in response to your recent inquiries concerning the unsubsidized tanker construction program and its relationship to the planning and construction of the Trans-Alaska Pipeline.

Traditionally, nonsubsidized U.S.-flag vessels have been built in U.S. shipyards for the carriage of cargoes moving in the domestic trades which are, due to the Jones Act, restricted to movement by such vessels.

At the time of the announcement of the construction of the Trans-Alaska Pipeline, virtually no unsubsidized tankers were under construction in U.S. shipyards. Since the development of the Alaskan oil market, 15 tankers, ranging from 80,000 dwt to 165,000 dwt have been contracted for without the aid of construction-differential subsidy but with financing guaranteed by the U.S. Government through the program provided for in Title XI of the Merchant Marine Act, 1936, as amended.

It is highly unlikely that these ships would have been built in the absence of the market potential offered by the trade from Alaska to the lower 48 states. Their construction would have been improbable without this market potential not only from a commercial point of view but also in terms of the ability of the

Maritime Administration to participate in the financing of their construction. In fact at the time the pipeline was initially under consideration, and until quite recently, it was contemplated that all of the North Slope oil would be used on the West Coast.

In considering approval of applications for Title XI loan guarantees, the Assistant Secretary for Maritime Affairs is required by 46 U.S.C. 1104(d) to determine that the proposed project is economically sound. In making this determination, an analysis is made of the expected employment of the vessel. In connection with the financing of each nonsubsidized tanker in recent years, the Maritime Administration has relied heavily upon the probability of profitable employment of such ships in the Alaskan oil trade. At this time Government-guaranteed obligations in excess of $650,000,000 are outstanding with respect to nonsubsidized tankers intended for use in the domestic trades of the United States.

In the event that for some reason the Alaskan trade were not to be available for these vessels, the only other logical markets would be either the coastwise movement of oil or the Strategic Petroleum Reserve Program, a program involving Government-generated shipments of oil at least 50 percent of which, in accordance with 46 U.S.C. 1241 (b) (i), are required to be shipped on privately owned U.S.-flag vessels to the extent they are available at fair and reasonable rates. The application of a limited form of cargo perference in the commercial foreign trades was recently rejected by Congress and therefore this possible opportunity for employment of nonsubsidized U.S.-flag tankers in the foreign trade is effectively foreclosed.

It is now clear that if the opportunities for employment of U.S.-flag vessels in the Alaskan trade were to be substantially reduced, overtonnaging would be created in other domestic trades and probably the Strategic Petroleum Reserve Program as well. The result of this combination of events would likely be economic losses and possible defaults by these and/or other

Title XI program vessels with the ultimate requirement that the Government either advance payments to operators in order to avoid defaults or more likely the payment by the Government to bondholders pursuant to its full faith and credit guarantee.

Sincerely,

/s/ ROBERT J. BLACKWELL
ROBERT J. BLACKWELL
Assistant Secretary
for Maritime Affairs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Shipbuilders Council of America in Support of the Petition of American Maritime Association for Writ of Certiorari to the United States Court of Appeals for the District of Columbia was served by mail, postage prepaid, on April 17, 1979 to:

JOSEPH KLAUSNER
1028 Connecticut Avenue, NW
Washington, D.C. 20036
(Counsel for American Maritime Association)

MARK P. SCHLEFER
KOMINERS, FORT, SCHLEFER & BOYER
1776 F Street, NW Suite 500
Washington, D.C. 20006
(Counsel for Amerada Hess Corp)

SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(for Michael Blumenthal, Secretary of Treasury)

Respectfully submitted,

RICHARD E. SCHWARTZ
J. STEPHEN STREET
1055 Thomas Jefferson Street, NW
Washington, D.C. 20007
Attorneys for Amicus Curiae
Shipbuilders Council of America